SUPREME COURT, U.S.
FILED
JUL 7 - 2006
OFFICE OF THE CLERK

(2)

No. 05-1560

IN THE
Supreme Court of the United States

PATRICIA PERKINS-AUGUSTE,
Council President,

Petitioner,

v.

ARMENIO T. MONTEIRO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Statement of the Case 1

Reasons for Denying the Petition 15

A. Certiorari should be denied because petitioner makes repeated misstatements of fact. 15

B. Certiorari should be denied because it does not meet the standard for granting such petitions set forth in Rule 10. 19

C. The issue of causation does not present a question that warrants this court's review. 21

Conclusion 22

TABLE OF CITED AUTHORITIES

Page

CASES:

Coleman v. Kay, 87 F.3d 1491 (3d. Cir. 1996) 17

Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) 18

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 20

Lightning Lube, Inc. v. Witco., 4 F.3d 1153 (3d Cir. 1993) 17

Mitchell v. Foysth, 472 U.S. 511 (1985) 20

STATUTES AND RULES:

The City Council Rules and Procedures 11, 12, 20

Robert's Rules of Order 12, 13

Rule 10 19

Rule 15 15

STATEMENT OF THE CASE

Petitioner Patricia Perkins-Auguste ("Perkins") removed respondent Armenio T. Monteiro from a public meeting and had him arrested because he spoke against the adoption of a municipal budget. Such conduct violates the 1st amendment and Perkins is not immune from suit. This case does not warrant the grant of certiorari. We now explain, in some detail, the facts. We do so because petitioner has misstated numerous material facts.

In 2001, Plaintiff Armenio T. Monteiro was a dissident member of the City Council of the City of Elizabeth.

One of the major issues of disagreement in 2001 was the adoption of the municipal budget[1]. Monteiro, as in years' previous, opposed the adoption of the budget (2.8-21 to 2.9-13). Indeed, Monteiro spoke against the budget at public City Council meetings (T2.10-9 to 16).

Perkins was also a member of the City Council. However, she was a member of the majority faction of the Council which Monteiro opposed. She took office in 1992. In 2001, she was the City Council President. She always voted in favor of the budget (2.9-14 to 19).

In addition to the budget, Monteiro disagreed with the majority of other Council members, including Perkins, on numerous other issues. Indeed, Monteiro's disagreement with Defendant Perkins and the majority of the other Council

---

1. The Mayor, under the Elizabeth form of government, would present a proposed budget to City Council which would vote on its adoption (T2.9-23 to 2-10.3).

Members led him to oppose then Mayor Bollwage in the 2000 primary election. Defendant Perkins supported Bollwage. (T2.17-7 to 2.17-19). Instead, Monteiro supported Rafael Fajardo in the primary. Monteiro endorsed Fajardo, raised money and campaigned for him. (T2.18-3 to 5). Only one other Councilperson supported Fajardo; all others on Council, including Perkins, supported Bollwage (T2.18-6 to 15).

Bollwage defeated Fajardo in the 2000 primary and won the general election in 2000 (T2.18-16 to 21).

On April 10, 2001, a regularly scheduled Elizabeth City Council meeting was held (T2.36-1 to 3). There were several issue on the agenda, but the most volatile was the adoption of the City budget.

Approximately 300 members of the public, a larger crowd than usual, attended the meeting (T2.36-17 to 23). The meeting was videotaped by Cablevision, the local cable company (T2.36-24 to 37-9).

The meeting commenced with a public portion, giving members of the public the opportunity to speak. After that, the minutes were read and then the Council considered various ordinances and resolutions (T2.37-13 to 21).

The final part of the meeting concerned the public hearing on the budget (T2.37-22 to 2.38-2). Each Councilman was given the opportunity to comment concerning his views regarding the adoption of the budget. Monteiro, who had previously made known his opposition, spoke just prior to Perkins (T2.38-5 to 15). He was critical of the proposed budget and was repeatedly interrupted by Perkins when he criticized tax abatements and the City's relationship with a corrupt contractor.

Councilman Jackus, another majority member, then spoke. After that, Defendant Perkins spoke. She was visibly upset and angry at Plaintiff Monteiro because of his comments opposing the budget. Perkins started by looking at Monteiro and said:

> I just want to say, this is deception, what was found in the Council chambers (referring to a pamphlet urging residents to come to a meeting and oppose the budget). When you tell residents to come up to City Council because they're going to be charged additionally 600 and 800 dollars for owning a home in the City of Elizabeth, *this is deception, Councilman Monteiro, with your name on it.*
>
> *I do not want you to speak while I am speaking or I will have you removed.*
>
> COUNCILMAN MONTEIRO: *You're bringing up my name. You can't bring up my name and then sit there* and –

(emphasis added)

* * *

> COUNCILMAN MONTEIRO: I never disrespected any of my colleagues on City Council.
>
> COUNCIL PRESIDENT: As I was saying, you are out of order. *I asked you not to speak. Please have my colleague removed.*

(emphasis added)

COUNCILMAN MONTEIRO: And just like the colleagues have disrespected me, I never disrespected anyone on City Council.

COUNCIL PRESIDENT: You are out of order. I'm going to ask you to be removed.

COUNCILMAN MONTEIRO: I am not.

COUNCIL PRESIDENT: *As I was stating, this is deception*, when council members put this type of propaganda throughout the community, when you state there's a 600, an 800 dollar tax increase. My taxes, I own a home in this city, my taxes over the last two and three years only went up 25, 30 dollars for the entire year. So I don't know where you guys are coming off with a thousand dollars, $600, $800 tax increase. Get the facts straight. *If you don't want to vote for the budget, don't vote for the budget, but do not lie to the general population. This is disgusting.* If you want people to come to the meeting, you tell them to come up because there's something that they need to learn. *Do not lie. It's beyond deception.* This –

(emphasis added)

COUNCILMAN MONTEIRO: Well, we'll wait for the bills to come out. Madam President, we'll wait for the bills to come out in two weeks.

COUNCIL PRESIDENT: This man cannot keep his mouth shut. Please, ask him nicely –

COUNCILMAN MONTEIRO: You're going to have to arrest me.

COUNCIL PRESIDENT: Excuse me, you're not being arrested. I'm asking you to remove –

COUNCILMAN MONTEIRO: I am not leaving Madam President. It's a violation of my civil rights. It's a violation of my First Amendment rights.

COUNCILMAN JACKUS: *Well, Madam President, why don't we ask for a legal opinion on this before* –

(emphasis added)

COUNCIL PRESIDENT: I'm not having him arrested. I'm asking him to be escorted out –

* * *

COUNCILMAN JACKUS: *Madam President, if I may interrupt you for one second, there are rules and regulations in our code that we can adopt right now.*

(emphasis added)

COUNCIL PRESIDENT: Please have him up out of the seat, please, and either into the back room or out in the hallway.

OFFICER COX: Step out of the seat, please.

COUNCILMAN MONTEIRO: This is a violation of my First Amendment rights. I am an elected official --

COUNCIL PRESIDENT: Officer, officer, will you please have him taken –

COUNCILMAN MONTEIRO: With all due respect to my colleagues –

COUNCIL PRESIDENT: – out in the hallway.

COUNCILMAN MONTEIRO: What's your purpose?

OFFICER COX: I have to place you under arrest.

COUNCILMAN MONTEIRO: What did I do to be placed under arrest for?

COUNCIL PRESIDENT: Disrupting a meeting. Up.

COUNCILMAN MONTEIRO: I want to know what my charges are. If I'm going to be placed under arrest, I want to know what I'm going to be placed under arrest for.

COUNCIL PRESIDENT: Disrupting a public meeting.

ATTORNEY BOLANOWSKI: Councilman –

COUNCILMAN JACKUS: I'll make a motion.

COUNCIL PRESIDENT: Eddie, please.

(emphasis added)

ATTORNEY BOLANOWSKI: There are rules of city council. If the City council president that rules you out of order, then you have to abide by that ruling.

COUNCILMAN MONTEIRO: *I apologize, I understand that.*

COUNCIL PRESIDENT: Officer, please have him removed.

COUNCILMAN MONTEIRO: I was not disrespectful to any one of my colleagues in this council chamber. I respect –

COUNCIL PRESIDENT: Officer, will you please have him removed?

OFFICER MEOLA: Councilman Monteiro, (unintelligible)called the shots you're in violation, you have to leave. We're advising you, you know that we have to listen to what she asks us to do. If you refuse to, you're in violation of that act and we will put you under arrest.

There is a five minute recess. Upon resumption, there is calm and order.

COUNCIL PRESIDENT: Can you please (unintelligible) so I can continue on with the meeting. Thank you.

OFFICER COX: Mr. Monteiro, (unintelligible).

COUNCILMAN MONTEIRO: I do not intend to leave the city council because I am doing nothing wrong.

OFFICER COX: Would you stand up, please?

COUNCIL PRESIDENT: Just escort him out, Officer. Officer, you don't need to put the cuffs on him, just escort him out.

OFFICER COX: I can't (unintelligible) to leave unless he is placed under arrest.

COUNCIL PRESIDENT: You can place him under arrest without putting the handcuffs on. That's not necessary.

Officer Meola looks at Perkins and shakes his head. Perkins responds:

Place him under arrest.

OFFICER MEOLA: You're under arrest.

Councilman Monteiro is escorted out of the Council chambers by police officers while in handcuffs. At the end of the meeting, Perkins says:

> He filibustered for over 25 minutes. Not one council member opened their mouths. As soon as I speak and others speaks, he thinks he can just talk. That is not how this council will run meetings. It was disgraceful, and I would not put my council colleagues in it in terms of having them vote on it. That's a decision the president must make, and I am saddened by it, because I believe in free speech and I believe in representation. *But when you have council people who allow this type of propaganda to go out with their name on it to lure city residents up into council meetings, it's a disgrace also.*
>
> I own a home in this city, and for over the last four years, *taxes have not gone up no more than three percent, if any, in any of those given years*. Twenty-five dollars here, maybe 70 or 50 dollars here, nothing more. We all hate to raise taxes, but it's something you have to do if you are an elected municipal official. Taxes is just a part of the nasty job. Taxes is a nasty word, but we must realize, it's a reality in the United States of America. And again, I apologize to every resident in the City of Elizabeth who witnesses this tonight or tomorrow or whenever you see this on TV. We are trying to conduct the city business.
>
> For nine years I had to deal with budgets, and each time we're given a budget like my colleague

states, it's up to each and every council member to go over this budget with a fine-toothed comb. Once we receive it and vote on it, it is now the council's budget. Any question we have, if it's not answered by the administration, it is up to us, the council members, to drill to investigate. Our chief role as council representatives is to allocate funds to run the city, to investigate, and to appropriate. And if we cannot do that in a decent, orderly manner and respect one another's positions, then we're just all for waste.

Again, my colleagues, I apologize to you, but he left me with no decision but to have him to be removed. Constantly interrupting throughout the entire meeting, constant warnings. I have a two-and-a-half year old, and I was talking to him like my child, stop, stop. You're going to get it, stop. You're going to be thrown out of here, stop.

There comes a point in time when you must act, and again, I apologize to all those who witnessed this, you in the audience, I apologize but he left me no other choice. I cannot allow my colleagues to overrun the meetings just to make a point. *And I was so upset when I saw this out in the pews to get people to come up to the meeting, 600, 800 dollars. That is now how you get people to be informed. This is scare tactics. His name is on it, he allowed it.*

(emphasis added)

Perkins' foregoing conduct was contrary to the City's own established procedure in several ways.

The City Council has its own rules of procedure. (A64-74). The President's duties are set forth at § 3:

> § 3. Presiding officer: powers, duties.
>
> The President of the Council, chosen in the manner and for the term prescribed by the Administrative Code, shall:
>
> A. Appoint such special committees of the Council as may be authorized by motion or resolution.
>
> B. Preside at all meetings of the Council, and of the Committee of the Whole.
>
> C. State the question and announce the result on all matters upon which the Council may vote.
>
> D. Rule on all questions of order, subject to appeal to the Council.
>
> E. Sign all ordinances and resolutions adopted in his presence; and in his absence the President pro tempore shall sign ordinances and resolutions adopted in his presence.
>
> F. Have such other functions, powers and duties as the Council may from time to time prescribe.

(A66)

The Rule further provides, at § 20:

> *Proceedings governed by Robert's Rules of Order*
>
> *Except as otherwise specifically provided in these rules, the proceedings of the Council shall be governed by Robert's Rules of Order.*

(emphasis added) (A74)

Perkins' above conduct constituted wholesale departures from the City Council's well-established policies and procedures. Conversely, Monteiro's conduct was entirely proper.

Perkins' decision to arrest and remove Monteiro from the full membership of the Council on her own prerogative without approval from Council Chambers was directly contrary to a legal opinion which the City Attorney had issued less than a year prior to this event. On September 26, 2000, the City attorney advised that, under Robert's Rules of Order, only the full City Council could remove a member.

* * *

> . . . it is our opinion that if a member of City Council repeatedly refuses to comply with the orders and rulings of the President, *the member of City Council may be ejected from that particular meeting by vote of a majority of those Council members present and voting.* A lesser disciplinary sanction of censure could be imposed by a similar vote.

(emphasis added) (A62-63)

Perkins-Auguste also violated Roberts Rules of Order when she referred to Monteiro by name and engaged in a personal attack on him (by calling him a liar, among other things). Robert's Rules of Order deals with both of these precise issues and prohibits members from using members' names or attacking members' motives. (A75)

Conversely, it is quite clear that Monteiro's verbal response objecting to Perkins' conduct was proper and could not furnish any basis for removal. On this point, Roberts Rules require a member to immediate interrupt when he notices a breach of the rules by a fellow member. (A80)

Thus, Monteiro had the right to tell Perkins that, "you're bringing up my name. You can't bring up my name . . ." and his other comments.

Monteiro was removed from the Chambers and arrested. He did not vote on the budget (2.41-11 to 20). Councilman Jaspan walked out of the room in protest; the remaining members of Council, including Defendant Perkins, voted to adopt the budget (2.41-18 to 42-4).

After being escorted out of Chambers, Monteiro was led to the back of City Hall where there was a police vehicle waiting. He was placed in the back of the vehicle. He sat in the vehicle for ten minutes, with his handcuffs still on (2.42.17 to 23). The police officers stayed outside. Finally, they drove to the police station where Monteiro was processed for the arrest. Monteiro's handcuffs, which had been on for between twenty to thirty minutes, were finally taken off (2.45-4 to 21).

Monteiro was then transferred to another room where he was issued a summons for violating N.J.S.A. 2C:33-8 (A83) which provides:

> A person commits a disorderly persons offense, if, with the purpose to prevent or disrupt a lawful meeting, procession or gathering, he does so act, tending to obstruct or interfere with it physically.

(A86)

Monteiro remained in the police station for thirty minutes before he was finally released (T2.46-9 to 25).

The foregoing actions caused Monteiro emotional stress and humiliation (2.49-9 to 1).

Monteiro paid $5,000 to have a lawyer defend him on the summons charge (2.59-8 to 2.60-7). The municipal court trial occurred on February 13, 2002 (2.60-10 to 24). In January, 2004 Monteiro was found not guilty (2.61-1 to 5).

REASONS FOR DENYING THE PETITION

A. *Certiorari should be denied because petitioner makes repeated misstatements of fact.*

Rule 15 mandates that this brief in opposition to a petition for certiorari "should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the court if certiorari were granted". The rule further admonishes counsel that:

> . . . they have an obligation to the court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition.

There are numerous misstatements in the petition. The most fundamental is the contention, couched in conclusory terms without any reference to the record, that Perkins had Monteiro removed from the council meeting because he was disruptive (PB at 3-5). Perkins then asserts that she should have qualified immunity because she was simply acting as a reasonable council President in attempting to restore order. The simple fact however, is that is not factually accurate. Indeed, Perkins ignores that its factual assertions were totally rejected by the jury in this matter. The "Facts" are that Perkins ejected Monteiro from the Council meeting and had him arrested and detained against his will simply because Monteiro spoke against the adoption of the municipal budget which Perkins supported. Monteiro was not disruptive. That stated reason was simply a pretext to mask Perkins' unconstitutional actions.

The following assertions contained in petitioner's "Statement of the Case" are also inaccurate.

(a) "Monteiro . . . spoke virtually uninterrupted for twenty-four minutes". Not true. Perkins repeatedly interrupted Monteiro.

(b) "immediately after Ms. Perkins began to speak, councilman Monteiro interrupted her because he disagreed with the content of her speech". Not true. The transcript of the meeting indicates that Perkins immediately commenced her comments by attacking Monteiro's comments on the budget and threatened to remove him from the meeting even before Monteiro uttered a word. See discussion, *supra.*

(c) Petitioner then states:

> The petitioner exercised her power as President of the Council and ruled the respondent out of order. The respondent refused to be quiet, continuing to speak and interrupting the petitioner from exercising her right to express her opinion.

This is again not true. Monteiro was not disruptive even though Perkins continued to bait him.

(d) Petitioner then asserts:

> Two Elizabeth Police Officers serving as Sergeants-At-Arms requested Mr. Monteiro to abide by the Council President's orders. Mr. Monteiro advised the police officers that he would not comply nor would he leave the council chamber unless he was arrested.

> Officer Andrew Cox made the decision that the meeting could not move forward and decided to arrest Mr. Monteiro. This was done notwithstanding the fact that petitioner directed the Officer not to arrest Mr. Monteiro. The police officers explained to the petitioner that it was their decision to arrest Mr. Monteiro and he was now under their control.

The foregoing assertion is directly contrary to all the evidence in the record. The record reveals that it was Perkins who repeatedly directed the officers, to remove Monteiro. When the officers said they could only do so by arresting Monteiro, Perkins replied "arrest him".

Beyond this, the fatal flaw in petitioner's factual recitation is that it ignores this court's limited standard of review concerning the jury verdict in favor of Monteiro. Petitioner asserts "facts" in a way that grants it every favorable inference. But the opposite is the case. Monteiro is entitled to have the evidence viewed in a light most favorable to him and give him the benefit of every fair and reasonable inference. *Lightning Lube, Inc. v. Witco.*, 4 F.3d 1153, 1156 (3d Cir. 1993); *Coleman v. Kay*, 87 F.3d 1491 (3d Cir. 1996). An application of this standard demonstrates that the petitioner's presentation of the "Statement of the Case" is not accurate. Rather, in light of the above standard it is clear that the accurate portrayal of the case is set forth above at 1-15 and in the Court of Appeals' decision at 4a-9a. Reviewing those facts plainly demonstrate that Perkins-Auguste is not entitled to qualified immunity and this case does not present any issue warranting this court's review.

Perkins next asserts that "[she] did not violate clearly established statutory or constitutional rights of which a

reasonable person would have known". After making this assertions, petitioner seems to argue that Perkins cannot be held liable because she was simply maintaining order, asserting that:

> *Mr. Monteiro had an opportunity for over 20 minutes to express his views on the budget and to participate in all discussions. It was no longer his turn to speak, yet he interrupted the council president during her session.* No reasonable public official would believe that they were impinging upon the First Amendment rights of Mr. Monteiro to speak on an issue of public importance *when he was merely interrupting and not agreeing with the council president's position.*

[PB 13]

But as we have already noted, these factual assertions are not true. Instead, the record shows that Perkins had Monteiro removed because she did not like the content of Monteiro's speech against the budget. Monteiro was not disruptive, but Perkins said he was as a pretext for punishing Monteiro for exercising his first amendment rights. It is quite clear that punishing one for the exercise of 1st amendment rights violated clearly established constitutional rights of which a reasonable person would have known. Indeed, in *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) this court noted the general rule that the 1st amendment bars retaliation for protected speech has "long been clearly established". *Id.* at 593. This is what happened here. Monteiro was retaliated against — ejected and arrested — because he exercised his first amendment right to speak against the adoption of the municipal budget. That is why the Third Circuit, in this case, had no hesitancy in affirming the judgment. [13a-14a]

B. ***Certiorari should be denied because it does not meet the standard for granting such petitions set forth in Rule 10.***

Rule 10 sets forth the reasons this court generally considers in determining whether to grant a petition:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power;
>
> (c) a state court or a United States court of appeals had decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner, in a curt comment, asserts that:

> This case presents an important issue of Federal Law on which the decision of the Third Circuit conflicts with Supreme Court precedent and the holdings in other circuits.

> A review is warranted to resolve a conflict between improper intent, causation and restrictions on First Amendment Rights.

[PB at 6]

Petitioner, however, never explains how this decision is in conflict with any decision of another court of appeals, a state court of last resort decision or this Supreme Court. Instead, it simply cites various decisions and sets forth the holdings of those cases. It never explains how those decisions conflict with the instant decision.

There is good reason for this absence. The court of appeals decision simply applies the facts to settled case law, most notably, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Mitchell v. Foysth*, 472 U.S. 511 (1985). This case simply involves an application of settled law to the facts of this case. The only matter of contention concerned the issue pertaining to the removal of Monteiro. Specifically, defendant asserted that Monteiro was disruptive and this disruption warranted his removal. But this was the matter that was in dispute. Indeed, the overwhelming evidence adduced at the trial was that Monteiro was not disruptive and that he was removed in retaliation for giving a speech opposing the adoption of the municipal budget. This disruptive justification was simply a pretext to justify Monteiro's unconstitutional removal. This factual issue was properly resolved, as are all issues of material fact, by the fact finder. Such factual issues do not warrant this Court's intervention. Indeed, Rule 10 specifically provides:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous

> factual findings or the misapplication of a properly stated rule of law.

That this is so is evident from the petitioner's "statement of the case". This "statement" contains numerous misstatements.

C. *The issue of causation does not present a question that warrants this court's review.*

Petitioner's final assertion is that:

> The Court failed to recognize that even if improper motive is present, Mr. Monteiro must prove that there is causation between the improper intent and restriction of speech.

This claim warrants little discussion. The record plainly establishes that Monteiro was arrested and removed from the meeting because he spoke against the budget. Perkins repeatedly expressed anger about the content of the speech just before he was removed. Beyond this, the causation issue was not raised below, no instruction was requested on this issue and the *Mt. Healthy* causation test does not warrant review.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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